NO. 818

IN THE

UNITED STATES

Circuit Court of Appeals,

NINTH CIRCUIT.

SOUTHERN DIVISION.

Issola Rorick,

Plaintiff in Error,

vs.

Railway Officials and Employees Accident Association, a corporation,

Defendant in Error.

Brief of Plaintiff in Error.

HUNTER & SUMMERFIELD,
WORKS, LEE & WORKS,
Counsel for Plaintiff in Error.

Filed this .... day of April, 1902.

.. Clerk,

By .... Deputy Clerk.

Tel. James 4141 T J Spencer, Law Printer, 238-242 New High St

FILED

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STATEMENT.

This is an action brought by the plaintiff in error to recover upon a policy of life insurance issued by the defendant in error to her husband, David G. Rorick, the policy being made payable to the assured in case of injury not resulting in death, and to the plaintiff in error in case of death resulting from such injuries. The policy contains this clause:

"In consideration of his written application, which is hereby made a part hereof, and the agreement to fully perform and provide by all the provisions and condi-

tions of this contract, does hereby insure David G. Rorick, of San Jacinto, Cali., A. T. & S. F. Railway System, by occupation a passenger train conductor, under classification P. B., and agrees to indemnify him, subject to all the terms and conditions herein, against physical bodily injury as hereinafter defined.

"The insurance under this policy shall extend only to physical bodily injury *resulting in disability or death*, as hereinafter expressed, and which shall be effected while this contract is in force, solely by reason of and through external violent and accidental means, within the terms and conditions of this contract, and which shall *independently of all other causes immediately, wholly, totally and continuously from the date of the accident causing the injury disable the insured, and prevent him from doing or performing any work, labor, business or service, or any part thereof, within the conditions of this contract*."

The accidental injuries insured against are specifically defined in the policy, and are nine in number.

See record, pp. 7 and 8.

Most of the cases referred to are payable where the injury insured against occurs, within ninety days from the date of the accident causing the injury, but in case of disability for life, the injury must be such as to cause immediate, continuous and total disability for life, caused by one accident. The same is true with respect to loss of time per week allowed for. The policy further provides:

"The payment for loss under provisions 1, 2, 3, 4 and 5, above specified, shall be the full principal sum named herein. The payments for loss under provisions 6 and 7, above specified, shall be one-half of the principal sum named herein. The payment for loss under provision

8, above specified, shall be one-fourth of the principal sum named herein. The payment for loss of time, under provision 9, above specified, shall be at the rate of twenty-five dollars per week, not to exceed his average weekly wages, payable as hereinafter provided. Neither the insured nor his beneficiary shall be entitled to indemnity under any of the provisions 1 to 8, inclusive, above specified, for any injury received while the insured is claiming or receiving indemnity under provision 9 of this policy."

And as to injury resulting in death, the policy provides as follows:

"Should death result solely from such physical bodily injury, within the conditions of this contract, said association will pay, at its home office, as provided herein, the principal sum of five thousand dollars, to wife, Issola Rorick, if living, otherwise to the legal representatives of the insured."

The policy contains this further provision:

"Notice of the accident, causing the disability or death, shall be given in writing, addressed to the association at Indianapolis, Indiana, within fifteen days from the date of the accident *causing the disability or death*, stating the name, occupation and address of the insured, with date and full particulars of the accident causing the disability or death and causer thereof, and failure to give such notice within said time, shall render void all claims under this policy."

In this case the injury alleged to have occurred to the assured resulted in death within fifteen days after the injury occurred, but, as alleged in the complaint, at the time of the injury it was trivial in character, and was not regarded seriously by either the assured or the

plaintiff in error, the beneficiary under the policy. The complaint alleges as follows:

V.

That between the 11th day of March, 1900, and the 14th day of March, 1900, while said policy was in full force and effect as aforesaid, the said David G. Rorick received and sustained physical and bodily injury, to wit: traumatic injury of the cranium, at the vortex thereof, which, independent of all other causes, produced and caused his death within ninety days thereafter, to wit: on the 26th day of March, 1900, at the county of San Bernardino, state of California. That the said injury was effected solely by reason of and through external, violent and accidental means, within the terms and conditions of said policy.

VI.

That said injury was caused by the said David G. Rorick, while acting as conductor of a passenger train of the Atchison, Topeka & Santa Fe Railway system, raising his head and thereby striking a bolt or other iron in a railway car.

VII.

That the injury was at the time supposed to be trivial and not such as did or would result in either "disability or death."

VIII.

That said deceased, notwithstanding said injury, continued thereafter for six days to perform his duties as such conductor; that there was no visible or outward sign of injury resulting from said accident; that he suffered severe pains in the head which increased in violence until his death; that physicians were called on March 21st, 1900, and found him suffer-

ing as aforesaid and pronounced his disease as that of acute neuralgia.

IX.

That on, to wit: the 20th day of March, 1900, the said David G. Rorick did, as a direct and proximate result of said injury, become insane, and he did from that time until his death continue to be insane; that the plaintiff did not at any time know or have any reason to believe that his said insanity was caused by said injury.

X.

That neither the said deceased nor the plaintiff knew or believed that his, the said David G. Rorick's, sickness and suffering were caused by said accident, nor did the attending physcians attribute the same to the injury aforementioned.

XI.

That the cause of his death and that it was the result of said injury was first discovered by and as the result of an autopsy held by physicians immediately after the death of the insured, and until then it was not known or believed that his sickness, disability or death was caused by or the result of said injury.

The complaint further alleges that upon the discovery of the cause of death the plaintiff, within four days thereafter, notified the defendant of said injury and consequent death, in all things as required by the provisions of said policy.

Thus it will be seen that the injury occurred to the assured between the 11th and 14th days of March, 1900; that the death occurred on the 26th day of March, 1900, which would be within fifteen days of the time the injury occurred; that the injury was caused by the

assured raising his head and striking a bolt or other iron in a railway car; that it was supposed to be trivial, and not such as did or would result in either disability or death; that he continued thereafter for six days to perform his duties as such conductor, and that there was no visible or outward sign of injury resulting from the accident; that on the 20th day of March, which was within ten days after the injury occurred, the assured became, as a direct and proximate result of the injury, insane, and continued in that condition until the time of his death; that neither the assured nor the plaintiff in error believed or had reason to believe that the sickness and suffering was caused by the accident, and that the attending physicians did not attribute it to that cause; that the cause of his death, and that it resulted from his injury, was first discovered as the result of the autopsy held by physicians immediately after the death, and the notice of loss was given within four days after that time.

The complaint was demurred to by the defendant in error, and the demurrer sustained by the court below on the ground that the notice of loss was not given within the time required by the policy of insurance, and this is the only question in the case. The assignments of error are as follows:

"1. The Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division, erred in sustaining the defendant's demurrer to the second amended complaint.

"2. That said Court erred in dismissing the plaintiff's complaint.

"3. That said Court erred in rendering judgment

in said cause that the plaintiff take nothing by her action, and in favor of the defendant for its costs.

"4. That said Court erred in holding and deciding that the notice of the accident, injury and death of the assured mentioned in said complaint was not given in time, and that therefore the plaintiff was not entitled to recover."

ARGUMENT.

The court below held that the policy of insurance required, without qualification, that notice of loss must be given within fifteen days from the date of the accident, and that the fact of the insanity of the assured, the trivial character of the injury at the time of its occurrence, the fact that it did not cause disability such as was insured against in the policy until several days after its occurrence, that neither the assured nor the plaintiff in error, the beneficiary under the policy in case of death, knew or believed that the disability, illness and suffering of the assured which finally resulted in his death, was caused by the injury itself, that the physicians in attendance attributed it to an entirely different cause, and that the actual cause of the injury was not discovered until after his death, furnished no excuse whatever for the failure to comply with the provision of the policy requiring notice of the injury to be given within the time mentioned; and this is the question, and the only question, presented by this appeal.

In determining the question as to whether the requirement of notice within fifteen days after the accident is imperative and without qualification, and whether the condition upon which notice must be given

arose immediately upon the injury being inflicted, or whether the condition only arose when the injury became such as to cause the disability, and whether, in any event, the duty or obligation of giving such notice was imposed upon the plaintiff in error, who had no interest in the policy except upon the death of the assured, could have arisen until death occurred, must be determined by the terms of the policy taken as a whole. The question cannot justly be made to depend upon the single provision in the policy requiring notice. It is necessary to look to the provisions of the policy to determine whether the insurance company could become liable in any event until the injury became such as to result in disability, and whether the corresponding duty of the assured to give notice could arise until the injury assumed that degree of seriousness.

The agreement of the defendant in error, as expressed in the policy, is "*to indemnify him, subject to all the terms and conditions herein, against physical bodily injury, as hereinafter defined.*"

"The insurance under this policy shall extend only to physical bodily injuries *resulting in disability or death*, as hereinafter expressed. * * * And which shall, independently of all other causes, immediately, wholly, totally and continuously from the date of the accident causing the injury, *disable the insured, and prevent him from doing or performing any work, labor, business or service, or any part thereof*, within the conditions of this contract."

The policy contains this further clause:

"No liability by reason of any accident is assumed for more than one of the losses below specified, and pay-

ment for any one of such losses shall immediately terminate this policy and all liability thereunder."

Then follows an enumeration of the injuries that are covered by the insurance, from one to nine. And after further provisions not necessary to be noticed in this connection, is this clause in the policy, which is the only one giving a right of action to the plaintiff in error under the policy:

"Should death result solely from such physical bodily injury within the conditions of this contract, said association will pay, at its home office, as provided herein, the principal sum of five thousand dollars to wife, Issola Rorick, if living, otherwise to legal representatives of the insured."

The policy requires that notice shall be given "of the accident causing the disability or death."

Record, p. 13.

Now, it will be seen that there is no liability on the part of the insurance company under this policy until an injury is inflicted which causes either disability or death. It is only in case of such injury that notice is required to be given at all. The obligation and liability of the insurer to pay in case of injury, and that of the assured or the beneficiary under the policy to give notice of the injury, must be mutual. The kind of injury that would fix the liability of the insurer would impose upon the assured the necessity of giving the notice required by the policy, and not otherwise. The terms of the policy throughout are confined exclusively to such injuries as result either in disability or death. It cannot be said with any degree of reason that while the policy limits the liability of the insurer to that class

of injuries, that the requirement relating to the notice, which in terms applies, as does every other provision in the policy, to an accident causing disability or death, can attach immediately upon an accident happening which results in no such injury. In this case, as shown by the allegations of the complaint, the injury resulting from the bumping of the head against the car gave no outward sign of injury; that it was regarded as trivial in its nature, and that no disability in fact occurred until six days after that time, the assured continuing to perform his daily duty of conductor on the train until the end of that time. Now, surely here was not an injury causing either disability or death until six days after the accident itself occurred. Until it did cause disability, no liability attached to the company. Until such disability did occur, no duty of giving notice imposed itself upon the assured, because the injury was not within the terms of the policy at all, and the requisite notice was given within the fifteen days after the disability actually occurred, which brought the notice within the terms of the policy.

In this case there are at least three excuses for not having given the notice within the time prescribed in the policy.

1. That the injury did not become one causing disability until at least six days after the injury itself occurred, thereby imposing the obligation to give the notice under the terms of the policy.

2. Before the expiration of the fifteen days, the assured had become insane.

3. There was no obligation on the part of the bene-

ficiary under the policy, the plaintiff in error here, to give the notice until death occurred, because until that time she had no interest in the policy, and was under no obligation to give such notice.

If we turn to the authorities bearing upon the question, they seem to us to be clear and conclusive against the ruling of the court below. It was very justly said by the learned judge, that while the sympathy of the court might be with the plaintiff in error, care should be taken not to allow that consideration to affect the proper application of the rules of law in construing the terms of the policy, and the effect of the failure to give the necessary notice. But in the conscientious effort to avoid being influenced by considerations of sympathy, the learned judge has gone to the other extreme, and given a construction to the authorities that cannot be borne out. We cite the following authorities as supporting our contention that the notice in this case was given in time:

Western Commercial Traveler's Assn. v. Smith, 56 U. S. Appeals 393; 85 Fed. Rep. 401; 40 L. R. A. 653;

Oddfellows' Frat. Acc. Assn. v. Earl, 70 Fed. Rep. 16; 16 U. S. C. C. A. 596;

McFarland v. U. S. Mut. Acc. Assn., 27 N. W. Rep. 436;

Hoffman v. Manufacturers' Acc. Ind. Co., 56 Mo. App. 301;

Trippe v. Provident Fund Soc., 23 N. Y. Supp. 173;

Phillips v. U. S. Ben. Soc., etc., 79 N. W. Rep. 1.

Peele v. Provident Fund Soc. 44 N. E 661.

In the case of Phillips v. U. S. Ben. Soc., 79 N. W. Rep. 1, the provision in the policy was that in all cases of accident or sickness, immediate notice be given in writing, and that "failure to give such notice within five days from the happening of such accident or beginning of sickness renders the claim invalid, and it cannot be recognized or paid."

The plaintiff served notice in writing that he was totally disabled by neuralgia from doing any work. The notice in writing upon the diagnosis of the case by the plaintiff's physician. Subsequently, an examination was made by another physician, who attributed the illness to an injury which the plaintiff claimed to have received in the car shops at Ann Arbor. Thereupon the physician served a written notice that "he had been suffering for several weeks from an injury sustained in the car shops, which at that time was reported by his physician as sciatica, and treated as such, without success. Dr. Osborne, the health officer, and I, examined Mr. Phillips, and failed to find any trace of rheumatism. Whatever information you may require concerning this case will be freely furnished."

Still later, the plaintiff furnished proofs of loss on the 26th day of February, 1897, and on the 20th of April following, brought suit to recover on the policy. It was claimed in that case that the plaintiff did not give timely notice of his injury in accordance with the provisions of the charter and by-laws. In passing upon that question, the Supreme Court of Michigan said:

"Notice was served upon the Company with promptness after he had been informed by one of his physicians that his illness did not result from disease, but

from an accident. We do not think that the first notice that he was suffering with neuralgia was binding upon him. It would be a hard rule, and one which the rules of the Company must place beyond doubt, which would deprive a member of his benefit through the mistake of his physician. The notice was served as soon as he ascertained that the accident with which he had met was the occasion of his trouble. We think this is a sufficient compliance with the by-law."

That was a much stronger case in favor of the insurance company than the one at bar. Here the liability sought to be enforced is on account of the death of the assured in favor of one having no rights in the policy or cause of action until the death occurred. Neither the assured nor the beneficiary knew that the injury was the cause of the illness which eventually resulted in death. They were expressly informed by the attending physicians to the contrary. She was not informed of the true cause of the death until it was discovered by the autopsy after the death occurred. She gave notice within four days after that time. This was undoubtedly a full compliance with the provisions of the policy, assuming that there was any liability on her part to give the notice before the death occurred, which alone gave her an interest in the policy.

In the case of Odd Fellows' Frat. Acc. Assn. v. Earl, 70 Fed. Rep. 16, the policy was much like the one here under consideration. There, the insurance was against "bodily injury effected through external, violent and accidental means causing an external, visible mark upon the body," but, as said by the court:

"Such accident is not itself the subject of compensa-

tion. It must occasion in the certificate holder incapacity to continue his stated occupation, or result in the loss to him of hand, foot, eyes, or life. These specified consequences of the accident are the risks insured against. * * * In case death results, five thousand dollars is to be paid to the beneficiary, but as part of this all sums to which the certificate holder had previously become entitled are likewise reckoned. It nowhere appears in this certificate that there must have been the incapacity for business originating contemporaneously with the accident in order to make a claim for ultimate bodily hurt or loss of life. A claim of either kind might arise at the time of or within a few days after the accident. But the point to be noted is that if the incapacity for business as described does not follow the accident immediately or at once, no claim can arise or exist in favor of the certificate holder, *till a specified bodily disablement results*, *or in favor of the beneficiary till death results*."

In this respect, the policy is precisely like the one at bar. There was no liability on the part of the company until such injury was received as resulted either in disablement or death. There are two insurances in the policy, one in favor of the assured in case he was disabled, and the other in favor of the beneficiary, the plaintiff in error, in case death resulted. They were just as separate and distinct as if two policies had been issued. If there had been a policy of insurance issued entitling the beneficiary to insurance in case of the death of the assured under the circumstances present here, could it be claimed for a moment that the beneficiary, the assured being insane, could take any action under the policy by giving notice or otherwise, until the condition happened, viz.: the death of the assured,

which gave her an interest in the policy, or any right to act thereunder?

In the case under consideration the requirement as to notice was as follows:

"Written notice shall be given the said association at Westfield, Mass., *within ten days of the date of the accident and injury for which claim of indemnity or benefit is made*, with full particulars thereof, including a statement of the time, place, and cause of the accident, the nature of the injury, and the full name and address of the insured and beneficiary, and unless such notice and statement is received as aforesaid, all claim to indemnity or benefit under this certificate shall be forfeited to the association."

The claim for insurance resulted from the following facts:

"On August 4, 1892, Dr. Earl accidentally stepped on a wire nail, receiving therefrom a puncture in his foot. The wound, though visible, was very slight. Dr. Earl kept on with his professional work without any interruption whatever, for fourteen days immediately following the accident. He then became sick, and as the result of such accident died of lockjaw on the 27th day of said month. Proofs of loss were tendered by Mrs. Earle in due time, but the association declined to pay, insisting that a notice to the association of the accident within ten days of the date thereof was a condition precedent to liability, and that such notice had not been given."

In that case, as in this, the requisite of notice included the giving of full particulars of the accident causing the disability or death, and the causes thereof. In passing upon the question as to the sufficiency of this notice, the Court said:

"The notice here called for is plainly to be given when a claim for indemnity by the certificate holder, or of benefit by the beneficiary, is extant. If the incapacity, contemporaneous in origin with the date of the accident, has resulted, or if the mutilation or death has taken place, within the ten days, so that a claim for indemnity or benefit is outstanding, the ten days' notice seems to be required. But we see in this language no express call for such a notice if no 'claim of indemnity or benefit' be then made. If the words were: 'Written notice shall be, or shall have been, given the said association at Westfield, Mass., within ten days of the date of the accident and injury for which claim of indemnity or benefit is made,' etc., the question whether or not this defendant in error forfeited to the association the compensation to be paid her under this policy would arise. But Mrs. Earl made no claim for benefit against the association when said ten days expired. Her case, therefore, does not, and the learned counsel for plaintiff in error concede that it does not, fall within the provision quoted.

"As has already been suggested, this contract does not provide insurance against the accident itself, or the consequences in general of any accident. The compensation is to be given for specified hurts or losses resulting from accident, as that word is defined in the contract. The notice above called for must describe, not only the accident, but 'the nature of the injury,' for which the compensation is sought. From the standpoint of Mrs. Earl, the injury was the loss of her husband by death. Such a notice as is described could not have been given in her case, since the injury insured against, and which constituted the subject of her 'claim for benefit,' had not resulted when the ten-day period expired."

The extract given from the opinion, and the further discussion of the subject by the court in that case, is conclusive of the question presented here, if that case is to be followed. There is absolutely no difference in legal effect between the requirements as to notice in that case and the failure to give the notice and the questions presented here. The cases are alike in all material respects. The decision was by the Circuit Court of Appeals for the Seventh Circuit, and affirmed the judgment of the Circuit Court of the United States for the Western District of Wisconsin.

The case of Hoffman v. Accident Indemnity Company, 56 Mo. Appeals 301, is directly in point. The notice in that case was similar in all respects to the one at bar. The claim was by the beneficiary on account of the death of the assured. The requirement as to notice in that case was as follows:

"In the event of an accident or injury for which or from which, directly or indirectly, any claim may be made under this certificate, either for weekly indemnity or loss of limbs or loss of both eyes or for the death benefit, immediate notice shall be given in writing, signed by the member or his attending physician, or in case of death, by the beneficiary, addressed to the secretary of the company at Geneva, N. Y., stating the full particulars as to when, where and how it occurred, and the occupation of the member at the time, and his address, and the failure to give such immediate notice mailed within ten days of the happening of such accident shall invalidate all claim under this certificate."

It will be noticed that in that case the notice was required to be given within ten days of the happening of the accident, which is precisely the same as the notice

in the policy under consideration except as to the length of time. The death in that case did not occur until forty days after the happening of the accident, and notice was not given until after the death. It was contended there, as it is here, that the beneficiary was not entitled to recover because notice was not given within ten days after the accident, as required by the policy. But it was held that there was no obligation on the part of the beneficiary to give notice until the death of the assured, which alone gave her an interest in the policy or the right to act thereunder, the court saying:

"The beneficiary, until the death of the insured, had, at most, only an inchoate and contingent interest in the proceedings. The insurer could not, until that event took place, recognize her as a part of the contract having a present interest therein. She could have no claim under the contract until the death of the insured, and therefore she could give no notice of the accident or injury until that event occurred. She could not give the notice after the death of the insured, because of the remoteness of that occurrence from that of the injury."

Thus holding that in that case no notice at all was necessary. The further point was decided by the court in that case, that the requirement of notice as applied to the beneficiary was unreasonable, and therefore void. The same is true of this case unless the requirement can be construed as calling upon the beneficiary to give notice within fifteen days after the death occurs, instead of within fifteen days after the happening of the injury, for the reason that as held in both of the cases above quoted from, it was impossible for the beneficiary to give such notice, including the particulars of the injury

and its result, as required by the policy, until after the death occurred.

In the case of McFarland v. U. S. Mut. Acc. Assn., 27 N. W. Rep. 436, the terms of the policy were somewhat different, but the principle involved was the same. There the policy required two notices to be given. The provision was as follows:

"In the event of any accidental injury for which claim may be made under this certificate, immediate notice shall be given in writing, addressed to the secretary of this association, at New York, stating the full name, occupation, and address of the member, with full particulars of the accident and injury, and also, in case of death resulting from such injury, immediate notice shall be given in like manner, and failure to give such immediate written notices shall invalidate all claim under this certificate."

There, as will be seen, a notice was first required of the accident, and an additional notice of the death. The accident happened in the early part of May, as the result of a fall by the insured from his wagon. On the morning of the 12th of July following, he was taken violently ill, and died at eleven o'clock that night. From the date of the accident until the death, no notice was given the association of the injury, though an assessment was paid by McFarland about the first of July. A few days after the death, the widow and beneficiary wrote to the association as follows:

"My husband is dead and buried. He has died from an accident caused by a fall. If you wish any further information, write and let me know, and I will inform you as far as I know."

The claim of the defendant in the action was that

"all claims for indemnity were forfeited by reason of not giving the association immediate notice of the accident and injury, and in not making direct and affirmative proof of the death within six months after the accident." The case is like the one at bar in that the injury did not cause disability at the time of its occurrence, and that fact is commented upon by the court in the opinion, and after reviewing the evidence showing that he continued in his usual occupation of teaming for the last two months of his life, the court say:

"There was no evidence of total disability, and no notice of the injury was required."

The case is precisely like this, in that the policy here does not cover any injury except such as causes disability, and no liability or obligation to give notice attaches until such injury has been received, and until the disability did occur, there was no obligation on the part of the insured to give any such notice. And in that case the court held that no notice was necessary within the time specified after the accident, and that the notice given by the beneficiary after the death was in time.

In Trippe v. Provident Fund Soc., 23 N. Y. Sup. 173, the certificate of membership provided that notice of any accident or injury must be given, with full particulars of the accident and injury, within ten days after the injury or death. In that case, the insured was killed by the falling of a building, and his body was not found or the cause of death discovered until after the time within which notice was required to be given. Notice was given eleven days after the accident, and eight days after the body was found. It was insisted

in that case, as in this, that the notice was not given in time. It was held that the notice was given in time, and that it was impossible to give the notice as required by the policy, giving full particulars of the injury or death, because the particulars were not discovered until after the time when the notice should have been given. There is no difference in principle between that case and this, although the terms of the policy are somewhat different. In both cases the policy required the notice given to include full particulars of the injury and its results, which could not be done in this case any more than in the other, under the allegations of the complaint showing that they had no means of knowing, and did not know, that the death or the serious illness of the insured was caused by the accident. It seems to us to be beyond question, under these authorities, that the notice in this case was given in time. If, however, the policy could be construed as requiring the insured to give the notice of the accident or injury during his lifetime, and that that was a condition affecting the right of the beneficiary to recover in case of death, which we deny, then the two excuses mentioned above, viz.: the fact that the injury was not one causing disability, and was not, therefore, covered by the policy, until a time within fifteen days of the giving of the notice, and therefore the notice given by the beneficiary was in time, and that the insured, within the fifteen days after the injury occurred, became insane, and continued so until his death, applies to the failure to give notice of the injury to him, and is a sufficient excuse for not giving the notice. In Insurance

Co. v. Boykin, 12 Wall. 433, in which the question of the right to recover upon a policy of fire insurance was involved, the Supreme Court of the United States said:

"Based on the facts of the case, the defendants at the trial asked instructions, the substance of which is condensed in the proposition that they had a right to proof of loss by an intelligent being, and if plaintiff was insane, no such proof had been given, and if he were sane, then his affidavit showed such fraud as would defeat recovery. The last of these propositions is not denied, but was not asked as an independent instruction. But the first is too repugnant to justice and humanity to merit serious consideration. There are two obvious answers to it. First, the affidavit, whether of an insane man or not, is sufficient in the information which it conveys of the time, the nature, and amount of the loss. Second, *if he was so insane as to be incapable of making an intelligent statement, this would of itself excuse that condition of the policy.*"

So we submit that in any view that may be taken of the requirements of this policy and the acts of the plaintiff in error under it, the notice in this case was given in time, and that the Court below erred in holding to the contrary, and sustaining the demurrer to the plaintiff's complaint.

Respectfully submitted,

HUNTER & SUMMERFIELD,

WORKS, LEE & WORKS,

Counsel for Plaintiff in Error.